Supreme Court, U.S.
FILED

(1)

02 1858 JUN 23 2003

In the

Supreme Court of the United States

BOAKE SANDOZ D/B/A/ SANDOZ MAINTENANCE SERVICE, CLARENDON NATIONAL INSURANCE COMPANY, AND RUSSELL A. SERGENT A/K/A/ RUSSELL A. SARGENT,

Petitioners,

v.

SONIA BOCANEGRA, INDIVIDUALLY AND ON BEHALF OF RANULFO BOCANEGRA, JR ESTATE, ON BEHALF OF RANULFO BOCANEGRA, III, ON BEHALF OF CARINA BOCANEGRA, ON BEHALF OF ROBERTO BOCANEGRA, ON BEHALF OF ROLANDO BOCANEGRA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

BRINEY & FORET
PATRICK J. BRINEY
Counsel of Record
MATTHEW D. McCONNELL
413 Travis Street
Post Office Drawer 51367
Lafayette, Louisiana 70505-1367
Telephone: (337) 237-4070
Facsimile: (337) 233-8719

CURRY & TAYLOR • WASH D.C. • (202) 223-3160 •USSCINFO.COM

65 pp

QUESTIONS PRESENTED FOR REVIEW

1. What is the standard for lower courts to apply to determine the admissibility of pre-accident use of intoxicants to show liability for the accident and for punitive damages?
2. Where, aside from the proffered expert toxicology testimony at issue, there is neither direct nor circumstantial evidence of unfitness to drive, whether the proffered toxicology testimony, admittedly based upon the expert's common sense inference of impairment, that the driver had impaired perception and reaction time, is admissible?
3. Whether a proffered toxicologist's opinion that is admittedly based on common sense is admissible *expert* testimony under Federal Rule of Evidence 702?
4. Where a district court excludes expert scientific testimony based in part upon criticism of the expert's cited scientific literature, what is the standard applicable to the appellate court sitting in review of that decision with respect to the evaluation of the scientific literature?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are petitioners, Boake Sandoz doing business as Sandoz Maintenance Service, Russell A. Sargent, and Clarendon National Insurance Company. Clarendon National Insurance Company is a wholly owned subsidiary of Clarendon Insurance Group and is ultimately owned by Hanover RE (80%) and E&S Ruckversicherungs AG (20%).

The respondents are Sonia Bocanegra, individually and on behalf of Ranulfo Bocanegra, Jr. Estate, Ranulfo Bocanegra, III, Carina Bocanegra, Roberto Bocanegra, and Rolando Bocanegra.

Mothers Against Drunk Driving (MADD) filed an amicus curiae brief in support of respondent's appeal to the United States Courts of Appeals for the Fifth Circuit.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 13

APPENDIX

A. Circuit Court Decision 1a

B. District Court Judgment 20a

C. District Court Judgment 22a

D. District Court Judgment 24a

E. Order Denying Rehearing 26a

F. Minute Entry Evidentiary Hearing on Motion 27a

G. Minute Entry Verdict, Ruling, Comments 28a

H. Amended Minute Entry Verdict, Ruling Comments 29a

I. FRE Rules 403 ..... 34a

J. FRE Rules 702 ..... 34a

K. Transcript of Proceedings 35a

TABLE OF AUTHORITIES

CASES

BILLOW v. FARMERS TRUST CO., 266 A.2D 92 (PA 1976) 11

BOEHM v. ST. LOUIS PUB. SERV. CO., 368 S.W. 2D 361 (MO 1963) 10

CAMERON v. BOONE, 383 P.2D 277 (WA 1963) 10

DAUBERT v. MERRILL DOW PHARMACEUTICALS, INC., 509 U.S. 579, 113 S. CT. 2786, 125 L. ED. 2D 469 (1993) 7

DONALD v. TRIPLE S WELL SERVICE, INC., 708 SO.2D 1318 (MS 1998) 10

FORTIN v. HAIK, 287 N.W. 2D 681 (NEB 1980) 10

GENERAL ELECTRIC CO. v. JOINER, 522 U.S. 136, 141-43, 118 S. CT. 512, 517, 139 L. ED. 2D 508 (1997) 8, 13

GUSTAVSON v. GAYNOR, 503 A.2D 340 (NJ APP. DIV. 1985) 10

KUMHO TIRE CO., LTD. v. CARMICHAEL, 526 U.S. 137, 158, 119 S. CT. 1167, 1179, 143 L. ED. 2D 238 (1999) 8

MALAND v. TESDALL, 5 N.W. 2D 327 (IA 1942) 10

ROVEGNO V. GEPPERT BROS., INC., 677 F.2D 327 (3 CIR. 1982) 10, 11, 12

STATUTES AND RULES

28 U.S.C. 1332 2

FRE RULE 403 ..... 1, 5, 10, 11

FRE RULE 702 ..... 5, 7

SUPREME COURT RULE 10 6

OPINIONS BELOW

The February 19, 2003, Fifth Circuit panel opinion is reported at 320 F.3d 581, 60 Fed. R. Evid. Serv. 804 (5 Cir. 2003), and is reprinted at App.A, p.1a. The September 7, 2001 Judgment of the District Court entered on Rule 50(A) Motion, and the September 7, 2001 Judgment of the District Court entered on Jury Verdict following trial on the merits, are reprinted at App.B, p.20a. and App.C, p.22a, respectively. The District Court's September 11, 2001 Amended Judgment is reprinted at App.D, p.24a. The March 25, 2003, panel opinion, on rehearing, of the United States Court of Appeals for the Fifth Circuit is reprinted at App.E, p.26a. The August 28, 2001 Minute Entry regarding motions in limine is reprinted at App.F, p.27a. The September 5, 2001 Minute Entry and September 8, 2001 Amended Minute Entry with attached jury verdict are reprinted at App.G, p.28a. and App.H, p.29a, respectively. The transcript of the District Court's ruling and oral reasons is reprinted at App.K, p.35a.

STATEMENT OF JURISDICTION

The Fifth Circuit panel issued its opinion on February 19, 2003. The panel issued its denial of rehearing on March 25, 2003. This Petition for Certiorari is timely in that Petitioners have filed it within 90 days of March 25, 2003. The Court has jurisdiction pursuant to 28 U.S.C.§ 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of FRE Rules 403 and 702, which are reproduced in the appendix at App. I, p.34a and App.J,

p.34a, respectively.

STATEMENT OF THE CASE

I. Overview

This is a diversity jurisdiction, 28 U.S.C. 1332, wrongful death and survival action arising out of a motor vehicle collision that occurred in the State of Louisiana. There is complete diversity of citizenship between all plaintiffs (collectively, the Bocanegras, or the respondents) and all defendants, and the amount in controversy exceeds $75,000.00.

II. Background

In the early morning hours of December 10, 1998, at approximately 1:46 a.m., while still dark, a parking lot vacuum sweeper truck owned by Boake Sandoz, insured by Clarendon National Insurance Company and driven by Russell Sargent in the left of two eastbound lanes of Interstate 10, near Scott, Lafayette Parish, Louisiana, approached the scene of an earlier two-vehicle accident at approximately 70 miles per hour, the speed limit. Sargent's vehicle had low beam headlights on when his lights illuminated an unlighted van that was disabled in the earlier accident and at rest in the left-hand lane. Sargent did not have time to stop within his lane to avoid hitting the van. He slammed on his brakes and looked to his right to switch lanes but did not due to the presence of 18-wheeler traffic nearby in the right-hand lane. Sargent then swerved to the left of the van into the grassy median between the eastbound and westbound lanes of Interstate 10. When he entered the median, he had no reason to believe anyone was there. Then, immediately after first observing Mr. Bocanegra about

eight feet away, Sargent had neither time nor distance to avoid striking him.

(In the earlier accident decedent Ranulfo Bocanegra and three others had been traveling on Interstate 10 as passengers in a van headed eastbound when the van collided with an eastbound 18-wheeler owned and operated by released defendants who settled with plaintiffs. As a result of this earlier collision, the Bocanegra van was disabled and came to rest primarily in the left-hand lane of eastbound Interstate 10 while the 18-wheeler stopped on the right-hand shoulder further down the highway. At rest in the dark on the Interstate, the disabled van was without power and unlighted, having lost its battery in the collision. Ranulfo Bocanegra exited the disabled van and entered the grassy median between the eastbound and westbound lanes of the interstate.)

According to Don Ivey, accident reconstructionist, under the conditions faced by Mr. Sargent when he was first able to observe the disabled Bocanegra van in the dark with his low beam headlights, he did not have time to recognize, perceive, react, and stop his vehicle short of colliding with the Bocanegra van. Further, Sargent was not speeding, he could not have seen Mr. Bocanegra before entering the median or even early enough for a successful avoidance maneuver, and Sargent acted in a very reasonable and effective way to avoid colliding with the van.

A disinterested third party eyewitness, Lea Morgan, the driver of the 18-wheeler that was to Sargent's right when he first saw the disabled van, testified that Sargent all times drove appropriately under the circumstances and was not speeding.

An investigating officer, Danny Lieux, testified that when he first observed Sargent he was limping or swaying so he suspected he was *possibly* intoxicated.

After approaching Sargent, Lieux concluded that he appeared not to be intoxicated. Sargent in fact limped due to pre-existing injuries.

When Sargent's deposition was taken in this litigation, he testified, without any admission or suggestion of having done something to contribute to the cause of the accident, that approximately eight hours before the collision with the decedent he had smoked four or five hits of marijuana. He also testified that he got high that night and that he smoked marijuana almost daily. After smoking that night, he went to a billiards tournament for a few hours and then went to work driving the parking lot vacuum sweeper truck for several more hours. At the time of the collision he was driving back to New Iberia, Louisiana from Crowley, Louisiana, from one sweeping job to the next.

III. Pertinent Proceedings Below

This Petition for Certiorari arises out of the Bocanegra's attempt to show that Mr. Sargent's driving was impaired due to his use of marijuana and getting high approximately eight hours prior to the collision and that this impairment resulted in the collision. Prior to trial, the Bocanegra's proffered expert toxicology and accident reconstruction testimony. Their toxicologist stated that Sargent's marijuana use, less than twelve hours before the accident, impaired his perception and reaction time. The accident reconstructionist stated "any amount of [reaction] time Mr. Sargent lost due to impairment [from marijuana use] is time that could have been used in evaluating his avoidance options [and that] [t]he loss of that time increased the likelihood and severity of the crash."

Prior to the jury trial, in which petitioners urged the defenses of unavoidable accident and sudden

emergency and which resulted in a finding of no liability of petitioners, the trial court granted petitioners' Motions in Limine to exclude the Bocanegras' proffered experts in toxicology and accident reconstruction and to exclude any mention of Sargent's use of marijuana. The trial court ruled that the proffered toxicology testimony was not sufficiently reliable, as required by FRE Rule 702 and *Daubert* and its progeny, since even in the light of no other direct or circumstantial evidence suggesting impairment of Sargent's ability to operate his vehicle safely, the toxicologist admitted relying upon "common sense" plus the mere happening of the collision to opine that Sargent's perception and reaction time was impaired. In addition, the trial court closely scrutinized the scientific literature cited by the toxicologist and questioned the applicability of the expert's extrapolations to the offered opinions.

The trial court excluded the accident reconstruction testimony, for it was stipulated that it could not survive independent of the toxicologist's testimony.

Finally, the trial court denied any evidence of Sargent's use of marijuana for the Bocanegras' failure to make a sufficient minimal showing of a causal connection between the use of marijuana and Sargent's operation of the vehicle. Thus the FRE Rule 403 weighing of the danger of unfair prejudice from the evidence of use of marijuana outweighed its probative value, if any.

On the Bocanegras' appeal, the Fifth Circuit Panel reversed and remanded, finding that the toxicology testimony was sufficiently reliable since the cited scientific literature was peer-reviewed, the toxicologist's common sense assumption was generally accepted, and there was no need for a minimal evidentiary showing of a causal connection between the

use of marijuana and the happening of the accident other than the toxicologist's opinion of delayed perception and reaction time. If there was a required showing of a causal connection, the Panel reasoned, then there was nevertheless a sufficient showing because when officer Danny Lieux first observed Sargent he was either swaying or limping and, before concluding Sargent did not appear to be intoxicated, Lieux thought at least momentarily he might possibly be intoxicated. The Fifth Circuit Panel then summarily denied petitioners' application for rehearing.

Reasons for Granting the Writ

Those Supreme Court Rule 10 considerations applicable to this case are as follows: "a United States court of appeals has entered a decision in conflict with the decision of another...court of appeal on the same important matter;" "a United States court of appeals. . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort;" "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power;" "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court;" and "a United States court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court."

There is no disputing the regularity with which federal courts are called upon to apply the Federal Rules of Evidence in the exercise of federal court diversity jurisdiction over cases involving allegations of liability based upon impaired conduct resulting from the use of intoxicants. The fact that such allegations usually

form part of a punitive damages cause of action is another reason the evidentiary and proof requirements under the Federal Rules of Evidence applicable to these situations raise important questions of federal law.

Finally, review is warranted to provide guidance to the lower courts on the appropriate standards to follow in making evidentiary rulings regarding the admissibility of use of intoxicants evidence. Review is also warranted to provide the appellate courts a standard to follow in reviewing scientific literature the relevance of which has been called into question by the district courts in evaluating the inadmissibility of expert evidence.

I. Review is warranted because the Fifth Circuit Panel opinion decided an important federal question in conflict with this Court's *Daubert & Joiner* decisions and departed from the accepted and usual course of proceedings in doing so.

In *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), this Court set forth the standards for determining the admissibility of scientific expert testimony. *Daubert* explained that the trial court was obliged to undertake a preliminary assessment of whether the reasoning or methodology underlying proffered expert scientific testimony was scientifically valid and whether that reasoning or methodology properly could be applied to the facts. *Id.* at 592-93 and 2796. *Daubert* further explained that the FRE Rule 702 inquiry's overarching subject is the scientific validity and evidentiary relevance and reliability of principles underlying a proffered expert's proposed submission. *Id.* at 594-95 and 2797.

Post-*Daubert*, this Court's *Joiner* and *Kumho Tire* decisions dictated the standard of review of a trial court's passing on the admissibility of expert testimony. *Joiner* established the abuse-of-discretion standard, noting that a hallmark of the standard is due deference given to the trial court. *General Electric Co. v. Joiner*, 522 U.S. 136, 141-43, 118 S. Ct. 512, 517, 139 L. Ed. 2d 508 (1997). In *Kumho Tire*, this Court explained that "Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 158, 119 S. Ct. 1167, 1179, 143 L. Ed. 2d 238 (1999).

Especially pertinent to this discussion, in *Joiner* this Court undertook a critical analysis of scientific literature, which had been cited by a proffered expert, ultimately finding, "The studies were so dissimilar to the facts presented in this litigation that is was not an abuse of discretion for the District Court to have rejected the expert's reliance on them." *Joiner*, 522 U.S. at 144-45, 118 S. Ct. at 518.

As in *Joiner*, the district court here rejected the proffered toxicologist's reliance on his cited studies. In the Panel's opinion, however, the panel merely found the literature acceptably peer-reviewed. The panel did not discuss and presumably did not scrutinize the literature's ability, or lack thereof, to support the proffered testimony. Petitioners assert that scrutiny of the literature in the light of the circumstances of its offering, in addition to being required by *Daubert* and its progeny, is key to understanding the trial court's finding that the proffered testimony was unreliable since the literature does not support the expert's extrapolation of impaired perception/reaction time merely from Sargent's statement that he smoked four to five hits of

marijuana and got high approximately eight hours before the accident.

By failing to scrutinize the proffered expert's cited literature the Panel failed to give due deference to the trial court and to the requirements for ensuring proper *Daubert* gatekeeping proceedings.

This Court's *Daubert* line of cases strives to prevent just this superficial treatment of proffered expert testimony, and its purported foundations in science. The panel opinion is a reported decision, so its erroneous message that an expert's cited literature is sufficient if peer-reviewed even if it does not support the proffered opinions will be widely cited and relied upon. Without fear that cited literature will be scrutinized substantively, proponents of expert testimony may offer opinions so long as they also cite peer-reviewed literature. That result obviously was not intended by the panel, although it is certainly a risk resulting from that opinion's apparent standard for finding scientific testimony admissible.

This Court should address the panel's departure from the requirements of *Daubert*, *Joiner* and *Kumho Tire* and instruct the panel and other appellate courts that 1) an expert's cited literature gets more than *pro forma* review and 2) the reviewing court is obligated to scrutinize proffered scientific literature to determine whether it validly supports the offered opinion, thereby ensuring the continued level of scrutiny intended by *Daubert* to ferret out the junk from the science.

II. Review is warranted because the Panel addressed an important federal question that is not and should be settled by this Court and, further, the opinion is in conflict with the Third Circuit Court of Appeal on the same important matter as well as with numerous state courts of last resort.

The overriding issue addressed by the panel's decision was, given the paucity of instructive Fifth Circuit jurisprudence, what factual predicate was required to admit evidence of a driver's pre-accident use of intoxicants under FRE Rule 403. The trial court cited extra-jurisdictional law requiring that there be some supplemental evidence, above and beyond simple consumption of intoxicants, of a causal connection between the accident and consumption or, in other words, evidence revealing actions or conduct indicating an unfitness to drive. In particular, the trial court cited *Donald v. Triple S Well Service, Inc.*, 708 So.2d 1318 (MS 1998) and *Gustavson v. Gaynor*, 503 A.2d 340 (NJ App. Div. 1985).

In a review of pertinent jurisprudence, the *Gustavson* Court discussed that in jurisdictions that have considered the question (in the context of alcohol intoxication) the rule followed is that evidence of prior drinking is admissible as being relevant to the issue of the driver's fitness to drive only when there is some supplementary evidence from which the trier of fact may reasonably conclude that the drinking affected the safe operation of the vehicle. *Gustavson*, 503 A.2d at 342-43, *citing Rovegno v. Geppert Bros., Inc.*, 677 F.2d 327 (3 Cir. 1982); *Cameron v. Boone*, 383 P.2d 277 (WA 1963); *Fortin v. Haik*, 287 N.W. 2d 681 (NEB 1980); *Maland v. Tesdall*, 5 N.W. 2d 327 (IA 1942); *Boehm v. St. Louis Pub. Serv. Co.*, 368 S.W. 2d 361 (MO 1963); *Billow*

v. Farmers Trust Co., 266 A.2d 92 (PA 1976).

In the United States Third Circuit decision, *Rovegno*, 677 F.2d 327, *supra*, defendants sought to introduce evidence that, as determined from a blood sample, Rovegno's blood alcohol level at the time of the accident was 0.158% and, if permitted, defendants' expert would have testified such blood alcohol level made Rovegno unfit to drive. The District Court refused to admit the blood alcohol level evidence as it was not accompanied by other evidence such as "excessive speed, recklessness, or erratic driving." *Rovegno*, 677 F.2d at 328.

Applying Pennsylvania decisional law that "the mere fact of drinking intoxicating liquor is not admissible, being unfairly prejudicial, unless it reasonably establishes a degree of intoxication which proves unfitness to drive," the Third Circuit in *Rovegno* observed that the state law inquiry required the same discretionary weighing required by FRE Rule 403. Thus the Third Circuit expressly drew on its own decisions dealing with Rule 403 review and held that supplementary evidence of "unfitness to drive" or "other evidence suggesting high degree of intoxication" was required in order to admit evidence of drinking alcohol. *Rovegno*, 677 F.2d at 330. Ultimately, although there was evidence that Rovegno's truck was partly in the passing lane at the time of impact, the court found there was no other evidence that might have constituted a causal connection between his purportedly elevated blood alcohol level and the accident. *Id* at 331. Indeed, there was testimony that there was nothing unusual about Rovegno's operation of his vehicle before the accident. *Id.* The Third Circuit found no abuse of the trial judge's discretion in determining the probative value of that evidence was insufficient to overcome the unfairly prejudicial effect.

The evidence here is even more favorable for Russell Sargent than for Rovegno. Nevertheless, without the benefit of any supportive eyewitness or accident reconstruction testimony or physical evidence tending to suggest that Sargent exhibited an unfitness to drive, the Panel would admit the Bocanegras' toxicology opinion that Sargent's perception and reaction time was impaired, testimony that is not drawn from observation, measurement or reconstruction. Rather, this testimony at best, even if deemed reliable, can only support the *possibility* of Sargent's impaired perception/reaction time since *there is no evidence to suggest that his conduct reflected such impairment.* Thus the Panel's standard for admission of evidence of use of intoxicants appears only to require a showing of the possibility that there was an unfitness to drive, clearly a departure from *Rovegno* and *Donald*, *supra*, which require positive evidence of an unfitness to drive, not merely its possibility.

The Panel attempts to distinguish its opinion from the *Donald* and *Gustavson* cases saying neither of those cases involved an expert toxicologist opining that the consumption of intoxicants had an effect on the individual's cognitive functions. The Fifth Circuit Panel clearly misses the point. The toxicologist does not identify impaired behavior described or discovered by others as having occurred. Rather, he opines there was a delay in perception/reaction time for which opinion *there is no corroborating evidence.* Not even the Bocanegras' accident reconstructionist was able to proffer evidence of such a delay. The toxicologist's opinion should not, in this instance, operate independently to create supplementary evidence of unfitness to drive. There is no evidence but for the toxicologist's *ipse dixit* to show a connection between Sargent's use of marijuana and the collision. Under

Joiner, that is insufficient. *Joiner*, 522 U.S. at 146, 118 S.Ct. at 519.

The panel argued that even if it applied the *Donald* and *Gustavson* criteria that the testimony of Officer Lieux would satisfy the supplemental evidence requirement since his first impression of Sargent was that Sargent was "swaying back and forth" and that he was "possibly intoxicated." This mis-statement of the evidence is further evidence of why the appellate court should defer to the trial court, for the panel completely missed the significance of Lieux's testimony that Sargent appeared to Lieux to be "*limping* or swaying" and that ultimately Lieux determined he did not appear to be intoxicated. In any event, there is no sufficient supplementary evidence of Sargent's unfitness to drive, and the panel applied a rule of admissibility in conflict with the Third Circuit and state courts of last resort.

III. Conclusion

The admission of such potentially prejudicial evidence as the use of intoxicants prior to an accident is an important question of federal law since the issue arises frequently and under circumstances where there is much at stake, *i.e.*, it is generally coupled with inflammatory rhetoric and punitive damages causes of action.

By reviewing this decision, the Court may address an evidentiary issue of first impression and provide guidance to the lower courts in an area of commonly applied and significant federal evidentiary law. Further, the Court may resolve the apparent conflict between the Fifth Circuit Panel and the Third Circuit *Rovegno* case as well as the cited cases from the state courts of last resort.

The difficulty experienced by the lower courts

with this evidentiary issue is manifest in the Panel opinion. Indeed, that opinion also exhibits the significant danger of unfair prejudice posed by the evidence at issue where it states, "as Bocanegra argues, it is difficult to see how one who smokes marijuana eight hours before driving an industrial vehicle 'did the best he could.'" Rather than evaluating Sargent's driving action, the Panel makes the fact of his prior use of marijuana issue preclusive, just as the trial court feared that a jury would do.

Despite the jury's "no liability" finding and the complete lack of evidence that Sargent exhibited an unfitness to drive, the panel glossed over the toxicologist's significant departures from reliable scientific extrapolation from scientific articles without performing any substantive scrutiny of his articles, and further would misconstrue the testimony of Danny Lieux that Russell Sargent was either limping *or* swaying and ultimately did not appear intoxicated as supplementary evidence that Sargent was unfit to drive despite there being no testimony or physical evidence exhibiting an unfitness to drive and the abundance of evidence that Mr. Sargent appeared not to have done anything wrong. Setting the standard for the admissibility of such evidence will improve the predictability of those issues in federal jurisdictions and should consequently assist in the resolution of such cases.

Additionally, the Panel opinion invokes the important federal question of what is the standard for appeals courts to apply in reviewing scientific literature cited in support of proffered expert's opinions. Review of the Panel opinion would allow this Court to ensure the proper review of scientific expert testimony in keeping with *Daubert* by rejecting the rubberstamp-approval of scientific literature merely because it is

peer-reviewed. This Court should determine whether the gatekeeping failure by the Panel is so great as to constitute a departure from the accepted and usual course of judicial proceedings as set forth in *Daubert* and *Joiner* and should be remedied in the published reporters where it can already be found.

RESPECTFULLY SUBMITTED:

BRINEY & FORET
PATRICK J. BRINEY - # 03467
MATTHEW D. McCONNELL - #24548
413 Travis Street
Post Office Drawer 51367
Lafayette, Louisiana 70505-1367
Telephone: (337) 237-4070
Facsimile: (337) 233-8719
ATTORNEYS FOR DEFENDANTS,
BOAKE SANDOZ DOING BUSINESS AS SANDOZ MAINTENANCE SERVICE, CLARENDON NATIONAL INSURANCE COMPANY, AND RUSSEL A. SARGENT

(Any footnotes trail end of each document)

No. 01-31121

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SONIA BOCANEGRA, Etc; ET AL,
Plaintiffs,

SONIA BOCANEGRA, INDIVIDUALLY AND ON BEHALF OF RANULFO BOCANEGRA, JR ESTATE, ON BEHALF OF RANULFO BOCANEGRA, III, ON BEHALF OF CARINA BOCANEGRA, ON BEHALF OF ROBERTO BOCANEGRA, ON BEHALF OF ROLANDO BOCANEGRA,
Plaintiff-Appellant,

v.

VICMAR SERVICES, INC; ET AL,
Defendants,

BOAKE SANDOZ D/B/A/ SANDOZ MAINTENANCE SERVICE, CLARENDON NATIONAL INSURANCE COMPANY, AND RUSSELL A. SERGENT A/K/A/ RUSSELL A. SARGENT,
Defendants-Appellees.

February 19, 2003, Decided

COUNSEL: For SONIA BOCANEGRA, Plaintiff - Appellant: James Parkerson Roy, Domengeaux, Wright, Roy & Edwards, Lafayette, LA. David Tarrant Bright, Mikal C Watts, Watts Law Firm, Corpus Christi, TX. Roger S Braugh, Jr, Sico, White & Braugh, Corpus Christi, TX.

For BOAKE SANDOZ, CLARENDON NATIONAL INSURANCE CO, RUSSELL A SERGENT, Defendants - Appellees: Patrick J Briney, Matthew D McConnell, Briney & Foret, Lafayette, LA.

For MOTHERS AGAINST DRUNK DRIVING, Amicus Curiae: John Blaise Gsanger, The Edwards Law Firm, Corpus Christi, TX.

JUDGES: Before EMILIO M. GARZA and CLEMENT, Circuit Judges, and DAVIS *, District Judge.

OPINIONBY: Leonard DAVIS

OPINION: Sonia Bocanegra appeals a jury's take nothing verdict in her wrongful death and survival action against Appellees Boake Sandoz d/b/a Sandoz Maintenance Services, Clarendon Insurance Company and Russell A. Sargent (collectively "Appellees"). On appeal, Bocanegra challenges the trial court's exclusion of evidence relating to the effect of Russell A. Sargent's use of marijuana on his driving abilities at the time of the accident. For the reasons set forth below, we reverse and remand for a new trial.

BACKGROUND

Ranulfo Bocanegra, Jr. ("Ranulfo") was fatally injured in the early morning hours of December 10, 1998 when he was struck by an industrial sweeper truck as he stood on a grassy median following another accident on I-10 near Scott, Lafayette Parish, Louisiana. Ranulfo and three others had been traveling as passengers in a van driven by Javier Galvan ("Galvan"). As the van was traveling eastbound [*2] on I-10, it collided with an eastbound eighteen-wheeler driven by Moises M. Perez and owned by Vicmar Services, Inc. As a result of this

collision, the disabled van came to rest primarily in the left-hand lane, while the eighteen-wheeler stopped in the right hand shoulder further down the highway. Ranulfo and others exited the disabled van seeking safety on the grassy median on the left-hand side of the highway. Shortly thereafter an industrial sweeper truck driven by Russell A. Sargent ("Sargent") and owned by Boake Sandoz d/b/a Sandoz Maintanence Service approached the accident scene traveling eastbound in the left hand lane. Sargent swerved to the left onto the grassy median to avoid hitting the van, but ran over and fatally injured Ranulfo. When investigating police officer Danny Lieux ("Officer Lieux" or "Lieux") arrived on the scene, he observed Sargent "swaying back and forth" prompting Lieux to ask Sargent whether he had been drinking.

Ranulfo's wife, Sonia Bocanegra ("Bocanegra"), n1 filed this wrongful death and survival action on December 9, 1999 against Appellees in the Western District of Louisiana. n2 Prior to the case going to trial, Appellees filed motions in limine [*3] seeking to exclude any evidence relating to Sargent's use of marijuana approximately eight hours before the accident, including the testimony of two of Bocanegra's experts, Dr. Michael Evans ("Evans"), a toxicologist, and Steve Irwin ("Irwin"), an accident reconstructionist. Sargent had admitted during his deposition that he had taken five or six "hits" of marijuana around 5:30 or 6:00 p.m. on the evening of December 9, 1998 before reporting to work. The fatal accident occurred approximately eight hours later at 1:46 a.m. on December 10, 1998. Sargent further acknowledged during pre-trial testimony that when he smoked marijuana on December 9, he got "high." Evans' report stated that based upon reasonable scientific probability Sargent's marijuana use less than twelve hours before the accident impaired his perception and reaction time at the time of the accident. Irwin's report

stated that "any amount of [reaction] time Mr. Sargent lost due to impairment [from marijuana use] is time that could have been used in evaluating his avoidance options [and that] the loss of that time increased the likelihood and severity of the crash."

Appellees' motions in limine sought to exclude Sargent's testimony concerning his marijuana use, Evans' testimony regarding the effect of the marijuana on Sargent's driving ability, and Irwin's testimony concerning the cause of the accident. Appellees argued that Evans' opinions concerning the effect of marijuana on Sargent's driving ability failed to satisfy the criteria for the admissibility of expert testimony set forth in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). They also argued that the probative value of evidence of marijuana use was outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403.

On August 28, 2001, the trial court conducted an extensive Daubert hearing at which the trial judge exhaustively questioned Evans and Appellees' toxicologist, Dr. Joseph Manno ("Manno"). Irwin never testified [*5] because the trial court concluded that his testimony would rise or fall on that of Evans. The hearing began in mid-morning and did not end until 6:30 p.m. At the close of the hearing, the trial judge concluded that Evans' testimony failed to satisfy the Daubert criteria, and that the probative value of the evidence was substantially outweighed by its prejudicial effect. The trial court excluded Sargent's testimony of his marijuana use prior to the accident, Evans' testimony of the effect of Sargent's marijuana use on his driving ability, and Irwin's testimony concerning the cause of the accident. The case proceeded to trial with the jury returning a take nothing verdict upon which the

trial court entered a final take nothing judgment in favor of Appellees. On appeal, Bocanegra argues that the trial court erred in excluding evidence of Sargent's marijuana use and its effect on his driving ability on the night of the accident.

STANDARD OF REVIEW

The admissibility of expert testimony is reviewed under the abuse of discretion standard. Moore v. Ashland Chem., Inc., 151 F.3d 269, 274 (5th Cir. 1998). A trial court abuses its discretion when its ruling is [*6] based on an erroneous view of the law or a clearly erroneous assessment of the evidence. Resolution Trust Corp. v. Bright, 6 F.3d 336, 340-41 (5th Cir. 1993). If we find an abuse of discretion in admitting or excluding evidence, we next review the error under the harmless error doctrine, affirming the judgment, unless the ruling affected substantial rights of the complaining party. Great Plains Equip., Inc. v. Koch Gathering Sys., Inc., 45 F.3d 962, 967 (5th Cir. 1995).

ADMISSIBILITY OF EXPERT TESTIMONY

Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." This "imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.'" Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (quoting Daubert, 509 U.S. at 589, 113 S. Ct. 2786). The expert testimony must be relevant, not simply in the sense that all testimony must be relevant,

Fed. R. Evid. 402, but also in the sense that the expert's proposed opinion would assist the trier of fact to understand or determine a fact in issue. Daubert, 509 U.S. at 591-92, 113 S. Ct. 2786. Put differently, Rule 702 "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." Id. at 592, 113 S. Ct. 2786.

As to reliability, the Supreme Court has provided five, non-exclusive factors to consider when assessing whether a methodology is scientifically reliable. These factors are (1) whether the expert's theory can be or has been tested, (2) whether the theory has been subject to peer review and publication, (3) the known or potential rate of error of a technique or theory when applied, (4) the existence and maintenance of standards and controls, and (5) the degree to which the technique or theory has been generally accepted in the scientific community. Daubert, 509 U.S. at 593-94, 113 S. Ct. 2786. The test for determining reliability is flexible and can adapt to the particular circumstances [*8] underlying the testimony at issue. Kumho Tire, 526 U.S. at 150-51, 119 S. Ct. 1167. The party seeking to have the district court admit expert testimony must demonstrate that the expert's findings and conclusions are reliable, but need not show that the expert's findings and conclusions are correct. Moore, 151 F.3d at 276. Thus, the question before the trial court was whether or not Evans' testimony regarding the effect of Sargent's marijuana use on his driving ability on the night of the accident was reliable and relevant under these standards to allow the testimony to go before the jury.

Reliability of Methodologies

In her first issue, Bocanegra argues that the trial court erred in excluding Evans' testimony because the

scientific findings underlying Evans' conclusions, i.e., that residual impairment from marijuana use lasts for at least twelve hours after ingestion, have been peer-reviewed and are widely accepted in the field of toxicology.

At the Daubert hearing, Evans cited extensive scientific literature showing that impairment of mental and cognitive functions from marijuana use continues to occur for at least twelve [*9] hours after the acute "high" has worn off. Jerome A. Yesavage et. al., Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report, 142 American Journal of Psychiatry 1325 (1985); Stephen J. Heishman, et. al., Acute and Residual Effects of Marijuana: Profiles of Plasma THC Levels, Physiological, Subjective and Performance Measures, 37 Pharmacology, Biochemistry and Behavior 561 (1990). Based on these studies and Sargent's admission that he smoked marijuana within twelve hours of the accident, Evans concluded that Sargent's driving ability, and more specifically his perception and reaction time, was impaired at the time of the accident.

The "Yesavage study" published in the American Journal of Psychiatry has been repeatedly relied upon by courts confronted with issues related to the residual effects of drug use. See, e.g., Holloman v. Greater Cleveland Regional Transit Authority, 741 F. Supp. 677, 686 (N.D. Ohio 1990) (citing Yesavage study's conclusion that 24 hours after marijuana use, pilots' mean performance "trends toward impairment" on all variables tested, with "significant impairment" shown in the performance of [*10] certain tasks) ; Fowler v. New York City Dept. of Sanitation, 704 F. Supp. 1264, 1275 (S.D.N.Y. 1989) (citing the Yesavage study for the proposition that "serious skill impairment has been measured 24 hours

after smoking a single marijuana cigarette."); Amalgamated Transit Union v. Cambria County Transit Authority, 691 F. Supp. 898, 907 (W.D. Pa. 1988) ("We find more persuasive the conclusion expressed in defendant's deposition exhibit 2: that exhibit reports that citing the Yesavage study's conclusion that twenty-four hours after smoking marijuana . . . pilots showed serious impairment on flight simulation tests). Indeed, even Appellees' toxicologist, Manno, testified that he considered the Yesavage study to be a valid, peer-reviewed study. Manno also stated that, in his own clinical studies, he has recorded impairment from marijuana twenty-fours hours after it was smoked.

Accordingly, the only possible basis for the trial court's rationale in excluding the evidence of marijuana is the application of the methodologies utilized in the cited studies to the facts of this case. In other words, the trial judge must have concluded that Evans' extrapolation [*11] of the methodologies in the studies to this case lacked a "valid scientific connection" to the case before him. The trial court appears to have concluded that Evans' testimony did not pass muster under Daubert for essentially two reasons. First, he noted that Evans was unable to point to any causal connection between Sargent's marijuana use and the accident. Second, the trial judge stated that since Evans did not know the quantity or quality of the marijuana Sargent ingested on December 9, Evans could not opine that Sargent was impaired. We now consider each of the trial court's two stated reasons for excluding the evidence at issue.

Causal Connection Between the Marijuana and the Accident

The trial court concluded that before any evidence of Sargent's marijuana use could be presented to the jury

there had to be some evidence of a causal connection between the marijuana use and the accident. It is noteworthy that Evans never held himself out to be an expert on accident reconstruction, but only on toxicology, and more specifically the effects of marijuana use on perception and reaction time and driving ability. Irwin, the accident reconstruction expert, [*12] who was not questioned by the court, had opined in his report that any impairment in perception reaction time increased the likelihood of the crash. Nevertheless, the trial court relied upon two cases, Gustavson v. Gaynor, 206 N.J. Super. 540, 503 A.2d 340 (N.J. Super. Ct. App. Div. 1985) and Donald v. Triple S Well Service, Inc., 708 So. 2d 1318 (Miss. 1998) to support its conclusion, both of which are distinguishable from the case at hand. Neither Gustavson or Donald involved a challenge to expert testimony under Daubert. Rather, both cases concerned challenges to the admissibility of evidence when the probative value of the evidence was substantially outweighed by its prejudicial effect.

In both Gustavson and Donald, the issue was whether evidence of prior consumption of alcohol may be admitted without evidence that the individual's conduct was affected by the alcoholic beverage. Gustavson, 503 A.2d at 342; Donald, 708 So. 2d at 1323. Both courts held that without evidence of conduct such as driving at an excessive speed, recklessness or erratic driving, or drunken behavior at the accident scene, [*13] evidence of alcohol consumption is "unduly prejudicial in view of its capacity to inflame the jury." Gustavson, 503 A.2d at 342; Donald, 708 So. 2d at 1323. In neither Gustavson nor Donald, however, did an expert testify that the alcohol consumption in question had any effect on the individual's cognitive functions. Further, even if we were to apply the criteria espoused in Gustavson and Donald for the admission of evidence of drug use,

Bocanegara proffered the testimony of Officer Lieux that when he came upon the scene after the accident, his first impression of Sargent was that Sargent was "swaying back and forth" and that he was "possibly intoxicated." When Lieux asked Sargent whether he had been drinking, Sargent stated he had not. Lieux did not detect the odor of alcohol on Sargent. Lieux did not ask Sargent whether he had smoked marijuana. Thus, Lieux's testimony and Sargent's admission that he got "high" on December 9 provided compelling evidence that Sargent's behavior at the scene of the accident scene was consistent with his admitted marijuana use earlier that evening. In contrast, the Gustavson court found that "there was a complete absence of any supplementary evidence of [the driver's] unfitness to drive . . . ." Id. at 343.

Here, Evans testified extensively that studies have demonstrated that marijuana use impairs cognitive functions, including those related to the operation of a motor vehicle, for at least twelve hours after the acute "high" wears off. Based on his own testimony, Sargent was within that twelve hour window when the accident occurred. Because of Evans' knowledge and training in the field of toxicology, his testimony would have been helpful to the fact-finder, not because it would have explained the connection between the marijuana and the accident, but because it explained the effect of recent ingestion of marijuana on an individual's cognitive functions, including perception and reaction time, both critical factors in any accident. n3 We do not consider the fact that Evans was unable to point to erratic driving or excessive speed as determinative of whether his testimony was helpful to the jury. Nothing in the record shows that a driver must be driving erratically or at an excessive rate of speed to be impaired by marijuana. The critical issue in this case

was whether Sargent's reaction time was affected by his ingestion of marijuana. Evans' testimony tends to show that it was. Even Defendants' expert, Manno, expressed reservations about an individual's driving ability after ingesting marijuana. When asked whether he would get in a car as a passenger with a driver who told him that he had taken five or six hits off a joint eight hours before, Manno replied, "Probably not."

Based on the foregoing, we conclude that the trial court erred in finding that Evans' failure to point to a causal connection between Sargent's marijuana use and the accident rendered his testimony unhelpful to the jury. We now turn to the trial court's second reason for excluding Evans' testimony, that Evans did not know the quantity or quality of the marijuana ingested by Sargent, and could not therefore opine that he was impaired at the time of the accident.

The Quality and Quantity of Marijuana Ingested by Sargent

We start from the notion that in few, if any, cases involving driver use of marijuana will there ever be specific evidence of the quantity or quality of the marijuana ingested. n4 However, the trial court apparently relied upon some of the literature discussed at the Daubert hearing which states that the effects of Delta-9-Tetrahydrocannabinol ("THC"), the major psychoactive chemical in marijuana, on an individual may vary due to differing concentrations of THC in marijuana plants, the physiology of the individual and the quantity of the THC ingested. Evans testified that these variables are mitigated because individuals who smoke marijuana "self-titrate, " that is they smoke to get high and then they stop. Evans further testified that he has gleaned this principle from his expertise in working

with people who use marijuana. He also testified that the idea that marijuana users "self-titrate" is a commonly held belief in the scientific community and that he was not aware of an instance where a person has smoked marijuana for a reason other than to get high. The record reflects that the trial judge considered Evans' reliance on "self-titration" to be an invalid "assumption," i.e., a conclusion that does not permit Evans to extrapolate the general findings of the cited studies to Sargent's experience on the night of the accident.

Although the trial court concluded that Evans improperly assumed that marijuana smokers "self-titrate," it is important to note that Manno agreed with Evans on many aspects of this issue. Manno acknowledged that Sargent admitted that he took five or six hits off a joint. Manno also testified as follows:

17. Do you assume that people smoke marijuana to get high?

1. It depends on what you define as high. People-different people use marijuana for different effects. As I don't smoke marijuana and I have never smoked marijuana, so I can only go by what people tell me. Some people smoke one or two puffs off a marijuana cigarette to get relaxed. That same individual may be at a party where in a recreational situation they want to be less inhibited and silly and have fun, and they may smoke more marijuana at that time to get intoxicated, a buzz, whatever word they use to describe a high. And this high is a situation where they have a release of inhibitions, and they can do things they normally would not do. And then other people use marijuana chronically on a daily basis to escape reality. They actually consume enough marijuana that they are considered a

motivational and don't sustain jobs. So different people have different use patterns.

Q. I appreciate that. You said two things there. You said something about some people smoke, you said one or two hits to relax or something like that?

1. That's correct.

17. Okay. He didn't smoke one or two hits by his own admission. He smoked, he said, five or six; is that correct.

1. It depends on - - one or two hits means whatever amount they need of marijuana, understanding that people don't go to a store and buy marijuana of two percent and know what they are getting. They buy street marijuana that has varying concentrations. When they use marijuana they titrate themselves because they get an effect immediately and they choose a level. If they have very weak marijuana, they'll take ten hits. If they have very strong marijuana, they'll take one hit. They will get the same effect either way.

17. Okay. Let me ask you the question I asked you a moment ago and also in your deposition.

"In rendering your conclusions, do you assume that [people] smoke marijuana for the purpose of getting high?"

17. That's correct.

It is clear from both Evans and Manno's testimony that, as a general principle, individuals smoke marijuana until they achieve a desired effect. None of the testimony adduced at the Daubert hearing shows that the general

principle of self-titration would not encompass Sargent's use of marijuana on December 9. Further, when considered in light of Sargent's admission that he took five or six hits of marijuana, Manno's testimony indicates that Sargent's purpose in ingesting marijuana was not simply to "relax."

While there are certain variables that cannot be known for certain, such as the exact dosage Sargent ingested on December 9, we are not persuaded that these variables alone render Evans' opinions concerning self-titration or his opinions in general unhelpful under Daubert. Sargent testified under oath that he took five or six hits of marijuana before going to work, and even that he "got high" on December 9. Evans' testimony concerning the effect marijuana ingestion would have had on Sargent's perception and reaction time as he approached the disabled van would have assisted the trier of fact. The fact that there are variables could have easily been presented to the jury through Appellees' toxicologist. We also note that when discussing these variables, Evans testified that while the degree of effect THC has on an individual may vary, the effects themselves will be the same. Further, Manno testified that an individual who has taken five or six hits off a joint with a known THC content will be "minimally impaired." Manno explained "minimally impaired" as "significant impairment. They increase their weaving ability on the road and things like that." Thus, it would seem undisputed that a person who has taken five or six hits off a marijuana joint will be impaired. It is simply the degree of impairment that is unknown because that is linked to the amount of THC ingested. We see no reason why Appellees could not present evidence concerning the fact that the THC content is unknown to the jury. The unknown specific THC ingested would go

to the weight to be given to Evans testimony, not its admissibility.

We are mindful that in the tightly controlled environment of a scientific study scientists are able to eliminate many unknowns. For example, in studies involving any drug, scientists can quantify the dosage ingested by participants in the study, they can know the quality and quantity of the psychoactive component in the drug, and they can, if they desire, determine the relative ability of a participant to absorb a drug. The real world, however, does not operate like a controlled study.

If all variables were required to be eliminated in a case where an actor has used marijuana or another drug and then been involved in an accident, evidence of drug use would never be presented to the fact-finder. Without evidence of Sargent's marijuana use in this case, the evidence presented at trial bore little resemblance to what actually happened. n5 Daubert and its progeny do not compel such a result. Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77, 85-86 (1st Cir. 1998) (holding that trial court improperly applied a standard of scientific certainty to testimony that driver was impaired by cocaine). Thus, we hold that the trial court erred in concluding that Evans' reliance on the principle of self-titration rendered his testimony unhelpful to the jury.

For the foregoing reasons, we conclude that the trial court's reliance on Daubert to exclude Evans' testimony concerning possible cognitive impairment resulting from Sargent's ingestion of marijuana on December 9 was an abuse of discretion.

ADMISSIBILITY OF EVANS' OPINIONS UNDER RULE 403

We review a trial court's decision to exclude evidence under Federal Rule of Evidence 403 n6 under the abuse of discretion standard. Caparotta v. Entergy Corp., 168 F.3d 754, 758 (5th Cir. 1999). Based on all of the reasons previously stated, we conclude that the trial court reliance on Rule 403 as another basis to exclude Evans' testimony concerning cognitive impairment resulting from Sargent's ingestion of marijuana on December 9 was an abuse of discretion. See Ballou v. Henri Studios, Inc. 656 F.2d 1147, 1155-56 (5th Cir. Unit A Sept. 1981) (holding that results of blood alcohol test showing intoxication were erroneously excluded under Rule 403 because evidence of intoxication was highly relevant and prejudice resulting from admission of evidence must be unfair).

HARM ANALYSIS

Because the trial court excluded all evidence of Sargent's marijuana use, the jury was not presented with a complete picture of what happened on the night in question. In closing argument, Appellees repeatedly argued that Sargent reacted reasonably and did the best he could under the circumstances. As Bocanegra argues, it is difficult to see how one who smokes marijuana eight hours before driving an industrial vehicle "did the best he could." On the record before us, we conclude that Bocanegra's substantial rights were affected because the jury was prevented from even considering the critical issue of whether Sargent's marijuana use affected his ability to react appropriately to the disabled van in his lane of travel on the night of the accident.

CONCLUSION

Bocanegra's first issue is sustained. The trial court's judgment is reversed and the cause is remanded for a new trial. n7

Footnotes

* District Judge of the Eastern District of Texas, sitting by designation.

n1 Bocanegra filed suit individually and on behalf of the Estate of Ranulfo Bocanegra, Jr. and their four children.

n2 Bocanegra also filed suit against Vicmar Services, Inc., Moises Perez and Lincoln General Insurance Company concerning the initial collision, but settled with these defendants prior to trial.

n3 A recent decision by a Louisiana intermediate appellate court supports our conclusion. In Wingfield v. Louisiana, 2002 La. App. LEXIS 3447, No. 2001 CA 2668, 2001 CA 2669 (La. Ct. App. November 8, 2002), the trial court excluded expert testimony that "impairment of the driver from marijuana use was probable and could have contributed to the cause of the accident." Id. at *17, 2002 La. App. LEXIS 3447. The appellate court concluded that the trial court erred in excluding such evidence because "the specific scientific knowledge imparted by the experts would be more probative than prejudicial." Id. at *15, 2002 La. App. LEXIS 3447. The court noted that the Daubert guidelines require "'only that the proponent of the evidence show that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion'" and that the possibility of baseless

prejudice against marijuana smokers would be addressed by the presentation of evidence from both sides. Id. Although the court held that the exclusion of the testimony was error, the court found that the error was harmless. Id. at 26, 2002 La. App. LEXIS 3447. See also Louisiana v. Ritchie, 556 So. 2d 651 (La. App. 1990), rev'd on other grounds, 590 So. 2d 1139 (La. 1991) (holding that evidence of a defendant's chronic marijuana use and possession of marijuana in a criminal prosecution for negligent homicide resulting from the defendant's operation of a motorboat was admissible even though there was no evidence that the defendant smoked marijuana the day of the accident). n4 Both experts agreed that there is no known "level" or "grade" of marijuana intoxication. Manno testified that once one's high wears off, there are no detectable THC levels in the blood, however, a negative blood test does not rule out impairment. This would make it very difficult, if not impossible, to detect known quantities once one's high has worn off.

n5 By our holding we are not concluding that a trial court may never exclude testimony in a drug case or a different type of case based on the fact that unknown variables render the testimony unhelpful to the jury. We are simply holding that in this case, the variables do not undermine the expert's testimony to the point that it is of no assistance to the jury.

n6 Rule 403 provides, in pertinent part:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ."

n7 Because we have sustained Bocanegra's first issue, we need not address her remaining issues.

Civil Action No. 6:99-2248

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Sonia Bocanegra, et al

v.

Boake Sandoz d/b/a/ Sandoz Maintenance Service, et al

Judge Tucker L. Melancon
Magistrate Judge Methvin

JUDGMENT

On the motion made after the close of plaintiffs' case in chief by defendant Boake Sandoz d/b/a Sandoz Maintenance Service, pursuant to Rule 50 (a) of the Federal Rules of Civil Procedure, for oral reasons assigned on the 31st day of August, 20001.

IT IS ORDERED that judgment be entered in favor of the defendant, Boake Sandoz d/b/a Sandoz Maintenance Service, and against the plaintiffs, Sonia Bocanegra, individually, on behalf of the Estate of Ranulfo Bocanegra, Jr., and on behalf of her minor children, Ranulfo Bocanegra, III, Carina Bocanegra, Roberto Bocanegra and Rolando Bocanegra, and plaintiffs' claims against Boake Sandoz d/b/a Sandoz Maintenance Service, in his individual capacity as owner of the sweeper truck, are
DISMISSED WITHOUT PREJUDICE.

Thus done and signed this 7th day of September, 2001 at Lafayette, Louisiana.

Tucker L. Melancon
United States District Judge

Civil Action No. 6:99-2248

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Sonia Bocanegra, et al

v.

Boake Sandoz d/b/a/ Sandoz Maintenance Service, et al

Judge Tucker L. Melancon
Magistrate Judge Methvin

JUDGMENT

The trial of this matter was conducted on August 29, 30, 31 and September 5, 2001. In accord with the jury verdict rendered on the 5th day of September, 2001,

IT IS ORDERED that judgment be entered in favor of the defendants, Boake Sandoz d/b/a Sandoz Maintenance Service and Russell A. Sargent, and against the plaintiffs, Sonia Bocanegra, Individually, on behalf of the Estate of Ranulfo Bocanegra, Jr., and on behalf of her minor children, Ranulfo Bocanegra, III, Carina Bocanegra, Roberto Bocanegra, and Rolando Bocanegra, and plaintiffs' claims are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the plaintiffs are taxed with costs pursuant to Rule 54 (d) of the Federal Rules of Civil Procedure.

Thus done and signed this 7th day of September, 2001 at Lafayette, Louisiana.

Tucker L. Melancon
United States District Judge

Civil Action No. 6:99-2248

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Sonia Bocanegra, et al

v.

Boake Sandoz d/b/a/ Sandoz Maintenance Service, et al

Judge Tucker L. Melancon
Magistrate Judge Methvin

JUDGMENT

The trial of this matter was conducted on August 29, 30, 31 and September 5, 2001. In accord with the jury verdict rendered on the 5th day of September, 2001,

IT IS ORDERED that judgment be entered in favor of the defendants, Boake Sandoz d/b/a Sandoz Maintenance Service and Russell A. Sargent, and against the plaintiffs, Sonia Bocanegra, Individually, on behalf of the Estate of Ranulfo Bocanegra, Jr., and on behalf of her minor children, Ranulfo Bocanegra, III, Carina Bocanegra, Roberto Bocanegra, and Rolando Bocanegra, and plaintiffs' claims are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the plaintiffs are taxed with costs pursuant to Rule 54 (d) of the Federal Rules of Civil Procedure.

Thus done and signed this 7th day of September, 2001 at Lafayette, Louisiana.

Tucker L. Melancon
United States District Judge

No. 01-31121

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SONIA BOCANEGRA, Etc; ET AL,
Plaintiffs;SONIA BOCANEGRA, Individually & on behalf of Ranulfo Bocanegra Jr Estate, on behalf of Ranulfo Bocanegra, III, on behalf of Carina Bocanegra, on behalf of Roberto Bocanegra, on behalf of Rolando Bocanegra,
Plaintiff - Appellant

v.

VICMAR SERVICES, INC; ET AL, Defendants; BOAKE SANDOZ, doing business as Sandoz Maintenance Service; CLARENDON NATIONAL INSURANCE CO; RUSSELL A SERGENT, also known as Russell A Sargent, Defendants - Appellees

March 25, 2003, Filed

JUDGES: Before EMILIO M GARZA and CLEMENT, Circuit Judges, and DAVIS *, District Judge.

*District Judge of the Eastern District of Texas, sitting by designation.
OPINIONBY: Emilio M. Garza
OPINION: ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

Emilio M. Garza

United States Circuit Judge

Civil Action No. 6:99-2248

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Sonia Bocanegra, et al

v.

Boake Sandoz d/b/a/ Sandoz Maintenance Service, et al

8/28/01

MINUTE ENTRY
EVIDENTIARY HEARING ON MOTION

Testimony and evidence for plaintiffs, concluded.

Testimony and evidence for defendants Boake Sandoz et al, concluded.

Defendants Boake Sandoz et al's Motion in Limine to exclude plaintiffs' proposed toxicology and accident reconstruction experts from testifying at trial is GRANTED. The word marijuana will not be used at the trial of this case.

Civil Action No. 6:99-2248

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Sonia Bocanegra, et al

v.

Boake Sandoz d/b/a/ Sandoz Maintenance Service, et al

9/5/01

MINUTE ENTRY
VERDICT, RULING, COMMENTS:

Each side will be allowed forty-five (45) minutes to present their closing argument. IT IS ORDERED that the verdict be recorded.

IT IS FURTHER ORDERED that the first note from the Foreperson of the Jury to the Court wherein the Jury requested further instruction, and the Court's reply thereto, be attached to the verdict.

A copy of the verdict is attached hereto.

[Editor's Note: A copy of the verdict is not re-printed here since it is re-printed in App ___ , p. 29a, and attached to the District Court's Amended Minute Entry.]

Civil Action No. 6:99-2248

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Sonia Bocanegra, et al

v.

Boake Sandoz d/b/a/ Sandoz Maintenance Service, et al

9/8/01

AMENDED MINUTE ENTRY
VERDICT, RULING, COMMENTS:

IT IS ORDERED that the United States Marshal furnish food and beverages to the Jury serving at the trial of this case as required this date, at government expense.

Each side will be allowed forty-five (45) minutes to present their closing argument. IT IS ORDERED that the verdict be recorded.

IT IS FURTHER ORDERED that the first note from the Foreperson of the Jury to the Court wherein the Jury requested further instruction, and the Court's reply thereto, be attached to the verdict.

A copy of the verdict is attached hereto.

JURY NOTE

Does #4 refer to:

1. 1st Accident
2. 2nd Accident

3. Both
Scott Smith
JURY FOREPERSON

Question #4 should read as follows:

4. Was Ranulfo Bocanegra Jr., the decedent, guilty of negligence that was a legal cause of the accident that resulted in his death?

VERDICT FORM

1. Was defendant Russell Sargent guilty of negligence that was a legal cause of the accident that resulted in the death of Ranulfo Bocanegra, Jr. on December 10, 1998?

YES NO (X)

If your answer to this question is yes proceed to the next question. If your answer to this question is no STOP. Have the foreperson sign and date this verdict form and tell the Court Security Officer that you have reached a verdict.

2. Was Javier Galvan, the driver ofthe van in whiph Ranulfo Bocanegra, Jr. was a passenger, guilty of negligence that was a legal cause of the accident that resulted in the death of Ranulfo Bocanegra, Jr. on December 1 0, 1998?

YES NO

3. Was Moises Perez, the driver of the eighteen wheel tractor trailer rig involved in the collision with the van in which Ranulfo Bocanegra, Jr. was a passenger, guilty of negligence that was a legal

cause ofthe accident that resulted in the death of Ranulfo Bocanegra, Jr. on December 10, 1998?.

YES NO

4. Was Ranulfo Bocanegra, Jr., the decedent, guilty of negligence that was a legal cause ofthe accident on December 10, 1998?

YES NO

5. If your answers to Nos. 1 - 4 above include one or more that are "Yes," then please indicate below the percentages of negligence, if any, that are attributable to each person or entity to which you answered "Yes." If you answered "No" as to a person or entity, then that person's or entity's percentage should be expressed as zero (0%).

A.	Russell Sargent	%
B	Javier Galvan	%
C.	Moises Perez	%
D.	Ranulfo Bocanegra, Jr.	%
	TOTAL	100%

(You do not have to find all parties negligent, but the sum of the percentages of fault assigned must be a total of 100%.)

6. Did decedent's wife, Sonia Bocanegra, suffer damages as a result of the accident that occurred on December 10, 1998?

YES NO

Ifyour answer is "No," please skip question No. 7 and proceed to question No. 8. If your answer is

"Yes," please proceed to question No. 7.

7. What are the total amount of damages expressed in dollars suffered by the plaintiff Sonia Bocanegra in this case, without reduction for percentage of fault that you may have assigned to any party in your answer to question number 5 above, for the following:

A. Wrongful Death of Ranulfo Bocanegra, Jr. $__

8. Did decedent's children suffer damages as a result ofthe accident that occurred on December 10, 1998?

A.	Ranulfo Bocanegra, III	Yes	No
B.	Carina Bocanegra	Yes	No
C.	Rolando Bocanegra	Yes	No
D.	Roberto Bocanegra	Yes	No

If your answer is "No," please skip question No. 9 and proceed to question No. 10. If your answer is "Yes," please proceed to question No. 9.

9. What are the total amount of damages expressed in dollars suffered by the plaintiffs Ranulfo Bocanegra, III, Carina Bocanegra, Rolando Bocanegra and Roberto Bocanegra in this case, without reduction for percentage of fault that you may have assigned to any party in your answer to question number 5 above, for the following:

A. Ranulfo Bocanegra, III
1. Wrongful Death of Ranulfo Bocanegra, Jr. $

B. Carina Bocanegra
1. Wrongful Death of Ranulfo Bocanegra, Jr. $

C. Rolando Bocanegra
1. Wrongful Death of Ranulfo Bocanegra, Jr. $

D. Roberto Bocanegra
1. Wrongful Death of Ranulfo Bocanegra, Jr. $

10. What are the total amount of funeral expenses expressed in dollars that were incurred as a result of the death Ranulfo Bocanegra, Jr.? $

11. Did decedent, Ranulfo Bocanegra, Jr. experience conscious pain and suffering as a result of the accident that occurred on December 10, 1998?

If your answer to this question is "Yes", proceed to question 12. If your answer to this question is "No," STOP. Have the foreperson sign and date this verdict form and tell the Court Security Officer that you have reached a verdict.

12. What are the total amount of damages expressed in dollars suffered by the decedent, Ranulfo Bocanegra, Jr., prior to his death, without reduction for percentage of fault that you may have assigned to any party in your answer to question number 5 above, for the following:

A. Conscious pain and suffering and mental anguish prior to his death. $

Have the foreperson sign and date this verdict form and tell the Court Security Officer that you have reached a verdict.

Lafayette, Louisiana this 5th day of September, 2001.

FRE Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FRE RULE 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case

Transcript of Proceedings

THE COURT: All right. Let me just say this, and I want the Fifth Circuit to know that it is almost five after six. I suppose if whoever of my betters who have read through this record, they understand that we have been here and it has been a long day, I'm going to try to be as concise as I can. I want to certainly cover every area that I think is appropriate. But I truly believe, and I believe this that it is not close within the record that's contained of the hearing, the questions that I asked, the questions the lawyers asked and the response of the two experts, so if I don't cover every base, I'll do the best I can. First of all, I think it's real clear and I think these lawyers all know how Rule 702, what that provides, that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified by – a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise. And the Daubert decision in some other cases that have followed have set out some guidelines for district judges to follow in making that determination. And the four factors that are most often referred to, Daubert factors, which that Court said are nonexclusive factors for a district court to consider is first, whether the theory or technique has been tested; two, whether the theory or technique has been subjected to peer review and publication; three, the known or potential rate of error of the method used in the existence and maintenance of standards controlling the techniques of operation; and four, whether the theory or method has been generally accepted by the scientific community. Now, that's the broad standard. And let me make a few observations before I go back and say that in my decision today I'm certainly guided by the parameters of those four

standards. But what I'm going to do here today is not limited to that, and as I said before, I think the record will bear out what I'm doing. First of all, I have to say that I did the best I can, I could, rather, to make sure that Doctor Evans, who was, after all, the pivotal person here, from my view, understood what it was that I was trying to do in establishing the universe; first, as it relates to what it is that he relied on in forming his opinions for the report that he prepared for the plaintiff's counsel in this case and what it is that he relied on that plaintiff's counsel had sent to him about Mr. Sargent's marijuana use. From the get-go, it seemed to me, that was critical that I understood where he was operating from, information that he used, so I could discharge my duties as the gatekeeper here. I think the record will bear out that I had, I wouldn't say an overly extended conversation, but several minutes of dialogue back and forth so he was clear what it was that I was trying to get out of him. And realizing that, as I said before in this case, the Fifth Circuit and the Supreme Court have certainly said that reading a cold, sterile record doesn't do everything for you; you don't get the little nuances, the demeanor and that kind of thing. But I had no doubt at the time that we were having this dialogue that Doctor Evans understood what I was trying to elicit from him. I make that observation in the light most favorable to Doctor Evans. From my perspective, sitting six feet away from him, he didn't understand, based on the testimony that Mr. Briney elicited on cross-examination. And I have to say I was a little – I won't say shocked, that's too strong – but I was surprised, based on the several exchanges that I had with Doctor Evans about his testimony and the known universe, the universe we are operating from here. Because I think the record will reflect, if you get the opportunity, Fifth Circuit to read it, we made reference to those terms universe several times after the initial

encounter with Doctor Evans. And again, that goes back to the dialogue that I had with Doctor Evans that I realize good expert witnesses are good and are able to express themselves. I said I'm going to try to be as concise as I can. Please answer the questions I ask. I thought we had that working relationship and understanding about the universe until Mr. Briney got to cross-examine the doctor. And we find out, well, in fact, there are other matters that he – or other documents that he referred to, these 60 or whatever it was. And the record will reflect somewhat the confusion between Mr. Bright and Mr. Briney about when this list, this spreadsheet I believe it was referred to, was provided and apparently came into Mr. Bright's office while he said he was down here in depositions. And Mr. Briney didn't know he had received it. Mr. Bright's office apparently faxed it on out in Mr. Bright's absence and Mr. Briney's office got it and he didn't know he got it until his paralegal brought it to him during the proceeding. But that's really not of great import as to my view of Doctor Evans's candor, frankly, with me in my initial examination and in what I observed or what I think I observed based on Mr. Briney's cross-examination. I will also say my view of Doctor Evans's responses to some of Mr. Briney's questions was that he was less than forthright and less than candid. That's my view, the best I can do sitting here. Now let me say this about the defense expert. The questions that I thought I had to resolve to get through Daubert in my gatekeeping role here, basically, Doctor Manno really didn't provide me with anything. I don't discount his testimony in the least, but for the ruling that I'm going to make, I don't rely on it either. The critical issue, it seems here to me, is if we talk about controls and talk about known quantities, what Doctor Evans said I find as a non-scientist – and again, I said earlier and I'll say it again for the Fifth Circuit, a little bit of knowledge is a dangerous

thing. But if we start with the assumption that anybody that smokes marijuana smokes marijuana in a sufficient amount so they get high, if it's what Doctor Evans referred to as ditch marijuana or high quality marijuana; they stop when they get high. And he said twice, at least, maybe three time, that he starts with that assumption. So everything else, whatever the test results that he relied on – I thought it was only eight papers subsequent to Mr. Briney's question. I was real clear on that, plus his general knowledge, education and experience, until Mr. Briney starts his cross-examination – that none of that really puts into play if you don't start with the assumption that people smoke marijuana until they're high. Mr. Sargent said he took five or six hits, thus he must have been high. And so everything, whatever was set out in these eight scientific articles or whatever else, comes into play. Another thing that overwhelms me here – I mean this is a serious, serious case that we have got here. We've got a couple of tragedies. We've got a dead husband and father. We've got a man, Mr. Sargent, who was driving the vehicle that struck him and ultimately resulted in his death. Well, that's an issue here, resulted in his death or ultimately resulted in his death. The jury will figure that out. I mean it was a tragedy for Mr. Sargent, too, I assume. I can only imagine how I would feel; and who knows how he feels because that's another control that he had no control over. So we've got two tragedies there.

And the plaintiff's counsel, good lawyers that they are, are doing what they can. And I sympathized and backed off a little bit when Mr. Bright says, "Judge, I'm just trying to make the record for Mrs. Bocanegra and her children." And I know he is trying his heart out and doing the best he can. But what the plaintiff's counsel is asking, based on the record before the Court which is set out here, is asking this Court to say, "Okay, jury,

there's marijuana involved here," allow the to get up here and say in essence what he said heretoday for the reasons that he said here today. And I'm bowled over how – when we get to that I want to talk about that a little bit – how the minimal showing that one must make in a case like this, a causal connection between Sargent's testimony that he used marijuana and anything else in the record that Doctor Evans said, "Well, the accident happened. It proves itself." That's what he said. When I said, "Is there anything else, Doctor, besides this fellow saying he took five or six hits of marijuana cigarette?" On that evidence, I'm being asked to let the jury let him get up here and testify in front of the jury, say that or something like that, and not think for a moment that this will be such a broad brush that the jury is going to lose sight of everything else. And we're not going to talk about what the witnesses saw. We're not going to talk about what the physical evidence reported from the people who investigated the accident. It won't matter. And I have got to say that I don't find, based on the record before the Court, that the requirements of Daubert in this situation are met by the testimony that Doctor Evans gave. I don't think I even have to get to the exhibits in Court 1 to try to make any finding on that at all. I'm struck again that we've got studies with three people, with ten people, all of those kind of things that, gee, you know, maybe they're the best we have got; I don't know. As far as my life experience, with all of the involvement that our society has had over the last 40 years with marijuana, I'm struck that there's not more out there. Maybe there is, and maybe Doctor Evans did rely on them, but I didn't see them and they weren't mentioned here today, other than what came up in Mr. Briney's cross-examination. Sorry about that, Mr. Briney, some things die hard.

MR. BRINEY: Thank you, sir.

THE COURT: Since Mr. Bright is not from here, it is obviously Johnson and Briney, a former firm that I was making reference to, and I don't know how long ago that has been, but that's the point. Now if I had found that Daubert had been satisfied –as I said earlier, we have looked, my office has, the lawyers haven't pointed out anything to me as being applicable in the Fifth Circuit about what's the district judge to do when faced with a situation like this – about well, there's some evidence that marijuana was smoked; no question, some marijuana was smoked. Let's go back to the critical thing to me – and if I can digress just a minute, there's nobody that got up here that could in any way other than Doctor Evans saying, "Well, he must have smoked enough to get high," there's nobody that quantified the amount of THC that that man ingested, or since they can't do that, what residual effect it possibly could have had on him. And I've got to say I have read the cited portions of Mr. Sargent's deposition that is in the record here as Mr. Bright directed me to, and it is pretty clear to me it's a cold and sterile record. It's pretty clear to me that we're talking about a minimum six-hour window there. I don't see any confusion when it's read, the several pages. I read not only the cited portions of the pages, but as I told Doctor Manno that he could do to get the context, I read a little before and a little after to make sure I had the full flow of it. It is not confusing to me. I don't think he reneged on what he said. I think it's probably to his credit. I don't know how he'll come across as a witness on the stand, but he sure looked like he was answering the questions the way I see it; and of course the Fifth Circuit will get to read that if that gets to be part of the issue. But again, getting back to where it is that a judge such as myself faced with a situation such as this one, the guidance, when you have some evidence of marijuana smoking, nothing in the Fifth Circuit per se. There's some dictum in a case that I

think the plaintiffs set out there, talking about comparing marijuana to alcohol and saying, marijuana is bad, too, or something like that but certainly nothing that would be of guidance. However, there is a case that talks about this issue in the context, again, of drinking that is pretty much parallel here. And it seems like really the right way to go for me in this kind of situation. And that is Mississippi Supreme Court had a case and it's Donald v. Triple S Well Service, Inc., recorded at 708 So.2d, 1318. That's a 1998 case, and it makes me believe that's probably So.3d, if my year is right and I think it is. In that Mississippi case, the court cited a New Jersey Supreme Court case. That case is Gustavson v. Gaynor. It's recorded at 503, and I guess that's Atlantic, but it would be the citation is A2d, at Page 340. It's a 1985 New Jersey Supreme Court case. And that issue and the issue in that case was regarding the admissibility of drinking or evidence of intoxication as it related to negligent driving. We have marijuana here, but the thought process seems to be good. And the Supreme Court of New Jersey said, "In those jurisdictions which have considered this question, the rule followed is that evidence of prior drinking is admissible as being relevant to the issue of the driver's fitness only when there is some supplementary evidence from which the trier of fact may reasonably conclude that the drinking affected the safe operation of the vehicle." That court went on to state, "The mere fact that a driver had consumed some alcohol beverages is by itself insufficient to warrant an inference that the driver was intoxicated and that the intoxication was of such a degree as to render him unfit to drive at the time of the accident. 'The admission of such testimony without supporting evidence is unduly prejudicial in view of its capacity to inflame the jury. The controlling consideration is whether the evidence and offers of proof present a picture of unfitness to drive sufficiently

clear that the probative value of the evidence of drinking or intoxication outweighs its potential for unfair prejudice." Now go back to Doctor Evan's testimony. I think it was my last question, but it's in there, "Doctor, in addition to what it is that you read that Sargent said, is there anything else that the plaintiff's lawyers have provided you with that would cause you to think that marijuana was a factor causing the accident or that Mr. Sargent was intoxicated?" I paraphrased myself. I'm not reading from anything, so that's the essence of what I asked, paraphrased. Doctor Evans's response was, "The accident, itself." Now that is not and cannot be in a court of law the standard. And so my finding, as I said, first, it doesn't withstand, under the facts of this case and the testimony of Doctor Evans, the scrutiny that a district judge is supposed to make under Daubert considerations. Two, there is no minimal showing of any involvement of marijuana as being an issue or Mr. Sargent being intoxicated or an issue in causing the accident, other than the testimony that has been cited by Mr. Bright. And that, based on that, the evidence, even if it had withstood Daubert, should not come in, and that any possible probative value is so far outweighed by its prejudicial effect. And again, like I say, the language here that the Supreme Court of New Jersey used is that it would inflame the jury. I don't have any doubt we're going to have a mother who I'm sure is going to be as sympathetic a person as we're going to see, four children, one of whom I understand needs an interpreter, come up here. And there's not a doubt in my mind, despite any kind of cautionary instruction about anything that this Court could give, if I let Doctor Evans get up here and say what he said today for the reasons he said it and then on top of that bootstrap the accident reconstruction expert, based on Doctor Evans's testimony, that it won't matter what else is

said. That broad brush will paint this picture and it is over; marijuana caused that accident, period, end of subject. And it can't be, it is not going to be. I'm going to exclude Doctor Evans. I'm going to grant the motion. I'm going to exclude Doctor Evans's testimony on the representations of Mr. Bright that if Doctor Evans falls, so does the accident reconstruction expert. I'm going to go ahead and say that he will not testify either. And that's on Mr. Bright's representation, "Judge, without Doctor Evans, we don't have the accident reconstruction expert," based on his report that he relied, for whatever reason on, whatever it was that Doctor Evans said. I don't misstate that, do I, Mr. Bright?

MR. BRIGHT: No, Your Honor.

THE COURT: And I don't know, Mr. Briney, that – I can't imagine since Doctor Evans is not going to be here that Doctor Manno is going to be here. Am I wrong about that?

MR. BRINEY: No, I think Doctor Manno will be in Shreveport.

THE COURT: Well, I want the Fifth Circuit to know it is now 6:26. I believe that I have covered the four corners that a district judge, one in my position, should. Perhaps if I would have recessed and gone back, I would have thought it through a little better. I have done the best that I could with what I have. I assure you I believe it is in the record, so if there's something that I didn't touch on, I would request my betters to please look at the record. Mr. Briney, you rise. Is there something else?

MR. BRINEY: As I understand your ruling, the evidence that would reflect to Mr. Sargent's marijuana use or any other drug use, none of that, the prior arrest, prior discharge, all of that is out?

THE COURT: That is absolutely correct. There will

not be the word marijuana mentioned in this trial. That's the Court's ruling, and I appreciate you making sure that I make that clear. It would be, based on what I have done with the experts here, it would be, I mean, other than just throw a bomb out there in the jury box and let them figure out what the heck that means. So nothing about marijuana comes in. That's not an issue. The issue is, under the circumstances that presented themselves on the night of the accident, did Mr. Sargent act the way he should or what is it that he did wrong? And we're going to go ahead about this just like it's any other car wreck. And the jury is going to do just like they always do, the best they can, and they're probably going to get it right if I don't screw up the instructions. And I'm going to ride you guys to make sure and help me in that task so I don't do it, so we don't get to do it again. I don't think we get to do it again over this issue for sure. But I've been wrong before and that's why my betters have a job down there, to straighten out the things that I screw up. Mr. Bright, is there anything else that you want to say today for this part of the record?

MR. BRIGHT: No, Your Honor. I think we have some scheduling matters that we'll want to take up with the Court.

THE COURT: All right. We're going to do that off the record so Ms. Bordenave can get out of here because she's going to be back at it again at 9:30.